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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

<p>SECURITIES AND EXCHANGE COMMISSION,</p> <p>Plaintiff,</p> <p>vs.</p> <p>VESCOR CAPTIAL CORP., a Nevada corporation, VESCOR CAPITAL , INC. a Nevada corporation, VESCORP CAPTIAL, LLC, a Nevada limited liability company, VESCORP CAPITAL IV-A, LLC, a Nevada limited liability compnay, VESCORP CAPTIAL IV-M, LLC, a Nevada limited liability company, and VAL E. SOUTHWICK,,</p> <p>Defendant.</p>	<p>MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM ORDER APPOINTING RECEIVER</p> <p>Civil Action No. 1:08cv12</p> <p>Judge Dee Benson</p>
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Movant Grubb & Ellis Realty Investors, LLC (“Grubb & Ellis”), by and through the undersigned counsel, hereby submits this memorandum in support of its Motion for Relief From Order Appointing Receiver. In support of its motion, Grubb & Ellis offers the following:

**BACKGROUND FACTS**

1. On or about April 3, 2007, Grubb & Ellis, formerly Triple Net Properties, LLC, entered into a Purchase and Sale Agreement (the “Purchase Agreement”) with R.O.C.S.E.V.

Capital, LLC (“ROCSEV”) for the purchase of real property and improvements located in Siena Office Park, City of Henderson, Clark County, Nevada (the “Property”). A true and correct copy of the Purchase Agreement is attached hereto as Exhibit A.

2. The Purchase Agreement was signed by Val E. Southwick as manager of VesCor Preferred Equity, LLC, which was the manager of ROCSEV. *See* Purchase Agreement at 25.

3. The purchase price for the Property was \$35,775,000.00. *See id.* at ¶ 2.01.

4. The Property appraised for \$36,500,000 as of January 18, 2007. A true and correct copy of the appraisal of the Property conducted by Robert A. Stanger & Co., Inc. is attached hereto as Exhibit B.

5. The purchase price paid was the fair market value of the Property.

6. The Purchase Agreement provides in paragraph 4.03:

The Contracts shall not include that certain lease between Apex Industrial Properties, LLC and Siena Office Park 2, LLC, a Nevada limited liability company dated August 1, 2005 (the “Apex Industrial Lease”), which has been terminated and shall not be assigned to Buyer. In consideration of rental revenues that will not be available to Buyer due to the termination of the Apex Industrial Lease and of costs of leasing the space leased pursuant to the Apex Industrial Lease, Seller shall cause the amount of Two Hundred Forty Thousand Nine Hundred Five Dollars (\$240,905) (the “Apex Industrial Holdback”), to be deposited into an escrow account with Escrow Agent at Closing. The Apex Industrial Holdback shall be used and disbursed in accordance with the terms of the Escrow Holdback Agreement (the “Escrow Holdback Agreement”) attached hereto and made a part hereof as Exhibit C.

7. The Purchase Agreement further provides in paragraph 4.04:

The Property is subject to that certain Lease Agreement between Siena Office Park 3, LLC, a Nevada limited liability company, and HQ Global Workplaces, Inc., a Delaware corporation dated December 9, 2005 (the “HQ Bldg 5 Lease”). With respect to the HQ Bldg 5 Lease, Seller shall cause the amount of Two Million

Eight Hundred Eighty Seven Thousand Five Hundred Twenty Two Dollars (\$2,887,522) (the "HQ Holdback"), to be deposited into an escrow account with Escrow Agent at Closing. The HQ Holdback shall be used and disbursed in accordance with the terms of the Escrow Holdback Agreement.

8. On or about May 31, 2007, the Escrow Holdback Agreement was amended by the parties (the "Amended Escrow Agreement"). A true and correct copy of the Amended Escrow Agreement is attached hereto as Exhibit C.

9. The Amended Escrow Agreement appoints Stewart Title Company of California as the Escrow Agent (the "Escrow Agent" or "Stewart Title").

10. The Amended Escrow Agreement provides certain terms upon which the Apex Industrial Holdback and the HQ Holdback (collectively the "Escrow Holdback") can be released by the Escrow Agent to the Buyer and Seller and in what amounts.

11. Paragraph 3.a. addresses the Apex Industrial Holdback and states in part:

One Hundred Fifty One Thousand Seven Hundred Dollars (\$151,700) of the Apex Industrial Holdback (the "Apex Rent Funds"), shall be used to cover rental revenues Buyer otherwise would have obtained from the Apex Industrial Lease had such lease not be terminated. . . . [O]n the first day of each calendar month . . . until such time as Buyer leases the Apex Space, Escrow Agent shall disburse to Buyer from the Apex Rent Funds the amount of Eight Thousand For Hundred Twenty Seven and 78/100 Dollars (\$8427,78).

12. ROCSEV is only entitled to the remainder of the Apex Rent Funds *after* the space has been rented. *See id.*

13. Paragraph 3.b. of the Amended Escrow Agreement addresses the remainder of the Apex Industrial Holdback:

Eighty Nine Thousand Two Hundred Five Dollars (\$89,205) of the Apex Industrial Holdback (the "Apex TI/LC Funds"), shall be used

to pay any tenant improvements and leasing commission costs incurred by Buyer in leasing the Apex Space.

14. ROCSEV and the Receiver are only entitled to the remainder of such expenses.

*See id.*

15. Paragraph 3.c. of the Amended Escrow Agreement reads:

In the event Buyer is unable to lease the Apex Space within eighteen (18) calendar months . . . such that the Apex Rent Funds have been disbursed to Buyer in their entirety (the “Apex Funds Termination Date”), the remaining Apex Industrial Holdback . . . shall be released to Buyer . . .

16. Paragraph 4.b) of the Amended Escrow Agreement addresses the HQ Holdback in part as follows:

Escrow Agent shall release an amount equal to the Monthly Contract Rent (as such term is defined in the HQ Bldg 5 Lease) minus the Base Rent (as defined in the HQ Bldg 5 Lease) pursuant to the terms of the HQ Bldg 5 Lease (regardless of whether such Base Rent is actually paid to Buyer) (each such payment, and “HQ Release”), as provided in this paragraph . . . Buyer and Seller agree that, to the extent that in a given month, buyer received all or a portion of the Monthly Contract Rent in excess of Base Rent and expense reimbursements required under the HQ Building 5 Lease (“Excess Rent Received”), that Seller be entitled to receive a portion of the next HQ Release equal to the Excess Rent received by Buyer.

17. On or about May 5, 2008, this Court appointed Robert G. Wing as Receiver (the “Receiver”) over Defendants Vescor Capital, Corp., Vescor Capital, Inc., Vescorp Capital, LLC, Vescorp Capital IV-A, LLC and “all affiliated limited partnerships, corporations or other business entities.” *See* Order Appointing Receiver dated May 5, 2008 at § I.

18. On or about June 9, 2008, the Receiver wrote Stewart Title claiming that the funds held in escrow belong in the receivership estate as assets of Vescor and requesting that

Stewart Title remit such funds to the Receiver. A true and correct copy of the Receiver's June 9, 2008 letter is attached hereto as Exhibit D.

19. Grubb & Ellis disputes that the Receiver is outright entitled to the funds held in escrow and asserts that the Receiver is only entitled to the funds as set forth in the Amended Escrow Agreement.

### ARGUMENT

#### I. The Escrowed Funds Do Not Constitute Receivership Property.

In determining whether the Escrow Holdback should be included in the receivership estate, this Court can rely on factors similar to those used by a bankruptcy court<sup>1</sup> to determine whether an escrow account is part of a debtor's estate:

Factors that are relevant, although not necessarily determinative, include whether the debtor initiated and/or agreed to the creation of the escrow, what if any control the debtor exercises over it, the incipient source of it, the nature of the funds put into it, the recipient of its remainder (if any), the target of its benefits, and the purpose for its creation. In short, whether an escrow constitutes property of a debtor's estate depends entirely on the nature and circumstances of the escrow in question.

*In re World Communications, Inc.*, 72 B.R. 498, 500-501 (D. Utah 1987).

In addition to these factors, receivership courts have relied on the language of escrow agreements to determine whether to include escrow funds in receivership estates. *See SEC v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657 (6th Cir. 2001) (holding that it was not abuse of discretion for the district court to find that the corporate entity and thus receiver had absolute title, free of claims to escrowed funds given the language of the agreement).

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<sup>1</sup> Bankruptcy analogies have been approved by receivership courts. *See Securities and Exchange Commission v. First Securities Co. of Chicago*, 507 F.2d 417 (7th Cir. 1974).

In this case, both the bankruptcy court factors and the language of the Amended Escrow Agreement compel the conclusion that the Escrow Funds should not be included in the receivership estate. ROCSEV agreed to the creation of the Escrow Holdback and for distributions to be governed by the Amended Escrow Agreement. ROCSEV did not and does not exercise any control over the distribution of the Escrow Holdback; it is governed by the Amended Escrow Agreement. The source of the funds was the purchase price for the Property, not any separate funds placed in escrow by ROCSEV. The nature of the funds was a holdback in consideration of certain tenant and lease issues connected with the Property. Both Grubb & Ellis and ROCSEV are entitled to receive distributions from the Escrow Holdback and either may be entitled to the remainder of certain funds in escrow depending on whether certain conditions are met. The target of the benefit of the Escrow Funds is Grubb & Ellis; the funds were intended to compensate Grubb & Ellis for certain lease issues involved in the Property. The purpose of its creation, as noted above, was in consideration for the purchase of the Property and to compensate Grubb & Ellis for certain lease issues.

In addition, the very language of the Escrow Agreement indicates that the Escrow Funds do not belong to ROCSEV outright. ROCSEV is only entitled to the remainder of the Apex Industrial Holdback when and if Grubb & Ellis are able to rent that space and tenant improvements are made. ROCSEV is entitled to a portion of the distributions of the HQ Holdback pursuant to the terms of the Amended Escrow Agreement just as Grubb & Ellis is. Some of those distributions are dependent on the rents received by Grubb & Ellis. Thus the very language of the Amended Escrow Agreement indicates that ROCSEV is not entitled to the entire amount of the Escrow Holdback.

This case is similar to that of *In re Cedar Rapids Meats, Inc.* 121 B.R. 562 (N.D.Iowa 1990). In that case a bankruptcy court concluded that an escrow account set up to guarantee payments of workers' compensation claims did not belong to the debtor's estate. One of the main reasons for this conclusion was that "The contract terms entitle the debtor to only the funds remaining after all worker's compensation claims are paid." The very terms of the contract created only a contingent claim on the part of the debtor to the funds in escrow. "[F]or the court to release the fund to the Debtor would be contrary to the agreement between the Debtor and [the creditor], and convert Debtor's contingent right [to the fund] into a non-contingent right." *Id.* at 568 (quoting *Dolphin Titan*, 93 Bankr. 508, 512 (S.D. Tex. 1988).

Like the debtor's rights to the escrow in *Cedar Rapids Meats*, the Receiver's right to the Escrow Holdback is contingent upon the terms created in the Amended Escrow Agreement. To allow the Receiver to take possession of the entire amount of the Escrow Holdback without complying with the terms of the Amended Escrow Agreement would be to grant the Receiver property he is not entitled to and never bargained for. It would be to give the Receiver greater rights in the Escrow Holdback than ROCSEV was entitled to. The Receiver may have an interest in the Escrow Holdback, but that interest is not the same as clear title and such interest is subject to the terms ROCSEV bargained for. Thus this Court should conclude that the Escrow Holdback does not belong in its entirety to the receivership estate.

## **II. This Court Should Order that the Terms of the Amended Escrow Agreement Be Enforced.**

Grubb & Ellis does not deny that the Receiver may be entitled to the distributions to which ROCSEV is entitled. Gubb & Ellis simply denies that the Receiver is entitled to anything more. Should this Court find that the Receiver is entitled to marshal the assets of ROCSEV,

Grubb & Ellis is willing to amend the Amended Escrow Agreement to allow the Escrow Agent to distribute funds to the Receiver otherwise due to ROCSEV as the Court directs.

### CONCLUSION

This Court should order that the Order Appointing Receiver does not allow the Receiver to take possession of the full amount of the Escrow Holdback. Rather this Court should rule that the Receiver is only entitled to those distributions to which ROCSEV is entitled.

Dated August 1, 2008.

Respectfully submitted,

s/ Katherine Norman Hansen  
David K. Broadbent  
Mona L. Burton  
Katherine Norman Hansen,

### **CERTIFICATE OF SERVICE**

I hereby certify that on 8/1/2008, I have caused to be electronically filed the foregoing with the Clerk of Court using CM/ECF system which will send notification of such filing to the following e-mail addresses:

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